

ARKANSAS SUPREME COURT

No. CR 08-628

STACY R. KING
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 13, 2008

PRO SE MOTION FOR EXTENSION
OF BRIEF TIME [CIRCUIT COURT OF
UNION COUNTY, CR 2005-249, HON.
HAMILTON H. SINGLETON, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2006, appellant Stacy R. King was found guilty by a jury of three counts of delivery of cocaine. He was sentenced as a habitual offender to 720 months' incarceration on each count to be served consecutively and fined \$25,000 on each count. The Arkansas Court of Appeals affirmed. *King v. State*, CACR 06-952 (Ark. App. Dec. 5, 2007).

Subsequently, appellant timely filed in the trial court a verified pro se petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged a pro se appeal here from the order.

Now before us is appellant's pro se motion for an extension of time to file his brief-in-chief. As appellant could not be successful on appeal, the appeal is dismissed and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

In the petition filed in the trial court, appellant raised six issues for relief. The last three

bases for postconviction relief were actual and constructive denial of counsel, actual innocence and denial of due process of law. Appellant listed these issues without any further explanation through factual support, argument or citation to authority.

Specifying factual grounds for relief is required by Rule 37.1(b), and appellant failed to comply with that requirement. Appellant also presented no citations to authority or convincing argument in support, and consideration of the issues by the trial court was thus precluded. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003). Moreover, appellant's claim of actual innocence amounted to a direct challenge to the sufficiency of the evidence supporting his convictions. Sufficiency challenges cannot be raised in Rule 37.1 proceedings. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

Of the three remaining claims, two arguments alleged ineffective assistance of counsel. Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

The first claim of ineffectiveness concerned introduction of chemical analysis reports at trial. The record in appellant's direct appeal showed that three reports authored by chemists with the Arkansas State Crime Laboratory ("crime lab") were introduced into evidence through one of the investigating officers, Officer Means. The reports showed that the drugs sold by appellant to a

cooperating individual were cocaine. Counsel did not object to introduction of the reports.

In the Rule 37.1 petition, appellant argued that trial counsel failed to take the proper procedural steps to call a forensic chemist as a witness. Arkansas Code Annotated § 12-12-313(d)(2) (Repl. 2003) requires ten days' notice to a chemist from the crime lab in order for the chemist to be called as a witness at trial. Appellant further claimed that counsel's failure to call a chemist as a witness precluded his constitutional right of confrontation.

Here, appellant failed to provide facts to establish that he suffered prejudice as a result of counsel's alleged ineffectiveness. *Nelson, supra*. In the petition, he contended that but for counsel's actions, "the results of the proceedings would have been different." He offered no further explanation as to how or why the appellant would not have been found guilty of the charges filed against him had counsel subpoenaed a state lab chemist as a witness. The burden was on appellant to establish prejudice through factual evidence and not conclusory statements. *Id.* Appellant did not do so and therefore failed to establish that trial counsel was ineffective for failing to secure a chemist as a trial witness. He also failed to show how he was prejudiced by counsel's actions with regard to the constitutional-right-of-confrontation allegation.

As part of this argument, appellant sweepingly asserted that counsel was ineffective for failing to object to introduction of the reports written by the state lab chemists.¹ But he failed to set out any facts demonstrating that his defense had been prejudiced by counsel's actions. *Nelson,*

¹In the petition, appellant also complained that the trial court erred in admitting the crime lab analysis reports into evidence. Rule 37.1 is a means to collaterally attack a conviction and does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). In addition, the decision to grant or deny a motion to sever is based on evidence presented to the trial court. Arguments concerning evidentiary matters are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

supra. Also, in the Rule 37.1 petition, appellant cited section “12-12-313(a)(b)(c)(d)(1)(2), And (3)” as the statutory foundation for objecting to the reports. An argument need not be considered when it is not apparent that an argument is well taken without conducting further research. *Weatherford, supra; Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001). That is the case here. The citation offered by appellant was confusing and in itself failed to explain how some unspecified subsection of a statute supported his argument. For these reasons, appellant did not show entitlement to relief under Rule 37.1 pursuant to the first ineffectiveness-assistance claim.

In the second claim of ineffective assistance, appellant argued that trial counsel was ineffective for failing to move for severance of the three criminal charges and to conduct three separate trials.² He stated in the petition that “severance was necessary to achieve a fair and impartial determination of [his] guilt or innocence[.]” He also broadly averred that there was insufficient evidence to show that the three drug sales were part of a single scheme or plan that would support joinder of the charges. Appellant concluded that, but for counsel’s failure to sever the charges, the jury’s verdict “would have been different.”

This argument did not state a claim for postconviction relief. Appellant neglected to detail the factual basis for finding that severance under Rule 22.2 was proper, and consequently failed to specify factual grounds for relief. Ark. R. Crim. P. 37.1(b). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Nelson, supra*. Additionally, appellant failed to put forth facts that supported his conclusion that he was prejudiced by counsel’s actions. *Nelson, supra*. The conclusory statements made by appellant cannot form the

²Under Arkansas Rule of Criminal Procedure 22.2, a defendant has a right to sever criminal charges that are joined solely on the ground that the charges are of the same or similar character and do not constitute charges that are part of a single scheme or plan.

groundwork for postconviction relief. *Jackson, supra*.

In the final argument in the Rule 37.1 petition, appellant posited that he was denied due process and a fair and impartial sentencing hearing. As the basis for this argument, he maintained that the trial court failed to instruct the jury that the recommended sentences could be served either concurrently or consecutively, and that he was entitled to the jury's recommendation on that point. Further, he claimed generally that the statutes governing trial judges' practices and procedures are illegal and unconstitutional as the statutes do not require a jury instruction explaining this particular aspect of sentencing.

Appellant's argument was wrongly premised upon the assumption that the jury's recommendation in this facet of the sentencing phase of the trial would have been binding. Instead, that decision was solely within the province of the trial court. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Also, so long as appellant's sentences were not excessive, the issue of whether his sentences should have run concurrently or consecutively does not present the proper basis for a Rule 37.1 claim. *Camargo, supra*; *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001).

Furthermore, the alleged unconstitutionality of unspecified statutes does not submit a valid foundation for postconviction relief. Even constitutional issues must be raised at trial or on direct appeal. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001). Both aspects of appellant's final argument failed to present claims that were cognizable in a Rule 37.1 petition.

Appeal dismissed; motion moot.